(37)

FILED
JUL 24 1945
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 256

A. A. SEKT,

Petitioner,

vs.

THE JUSTICE'S COURT OF SAN RAFAEL TOWNSHIP, COUNTY OF MARIN, STATE OF CALIFORNIA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA AND BRIEF IN SUPPORT THEREOF.

ALAN W. DAVIDSON,
816 Bank of America Bldg.,
Oakland, California,
Counsel for Petitioner.

INDEX

Subject Index

	Page
Petition for writ of certiorari:	
Summary and short statement of matters involved.	1
Jurisdictional statement	3
Questions presented	3
Reasons relied on for allowance of writ	4
Brief in support of petition for writ of certiorari:	
Opinion of Court below	5
Ground on which the jurisdiction of the Supreme Court of the United States is involved	5
Statement of the case	5
Specification of errors	7
Argument:	
The Supreme Court of California erred in holding that as a matter of law, judgment and sentence as passed by respondent was not void and unenforceable, and that Section 9608 of the Government Code of California was an applicable savings clause	8
Conclusion	15

Statutes Cited

(a) Criminal Practice Act of 1850–51, Sec. 177 and 608	11
(b) Government Code, Section 9608	14
(c) Penal Code, Section 153, 182, 888, 1426	5,6,9
(d) Political Code, Section 329	10,11
(e) State Const. of 1849, Art. 1, Sec. 8	11
(f) State Const. of 1879, Art. 1, Sec. 8	12
Constitutional Provisions Cited:	
Article 1, Section 9, Para. 3, Constitution of the United States	3,4,5,8
5th and 14th Amendments to the Constitution of the United States	5

Cases Cited

	Page
Ong Chang Wing v. *United States*	3
People v. *DeFaerari*, 63 Cal. App. 671–673	9
People v. *Lewis*, 4 Cal. App. 2nd Supp. 778	9
People v. *McNulty*, 92 Cal. 427 at 440	14
People v. *Tisdale*, 57 Cal. 104	9,13
Spears v. *County of Modoc*, 101 Cal. 303, 305	9
United States v. *Barr*, 4 Saw. 254	14

Texts

23 Cal. Jur. 783, Sec. 159	12
23 Cal. Jur. 795, Sec. 173	11

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 256

A. A. SEKT,

Petitioner,

vs.

JUSTICE'S COURT OF SAN RAFAEL TOWNSHIP, COUNTY OF MARIN, STATE OF CALIFORNIA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of A. A. Sekt respectfully shows:

Summary and Short Statement of Matter Involved

Petitioner was charged by *complaint* and convicted in February, 1943, in the respondent Court of violating section 182 of the Penal Code of the State of California by conspiring to violate section of 153 of the Penal Code of California, said violation being a misdemeanor.

An appeal was perfected to the Superior Court of Marin County, State of California, in October, 1944, where the conviction was sustained. At said appeal, the question now involved was raised. While still at liberty on bail, and pending appeal, and before affirmance of said judgment by the Superior Court above, the legislature of the State of California amended section 182 of the Penal Code of California, making it a felony to conspire to violate section 153 of the Penal Code, which was effective before affirmance by the Superior Court. That by the amendment passed, the legislature repealed the law under which defendant was charged, tried and convicted, said repeal being without a savings clause as to offenses committed prior to said amendment and repeal. Thereupon, application for permanent writ of prohibition was made to the Supreme Court of the State of California on the grounds that the respondent Court was without jurisdiction to enforce the judgment originally entered and that its enforcement would be the enforcement of an ex-post facto law as regards petitioner. This was denied on April 27, 1945.

Stay order has been issued by the Supreme Court of California pending this petition for a writ of certiorari. The Supreme Court of California by unanimous opinion held that as a matter of law, section 9608 of the Government Code operated as a general savings clause saving prosecution and punishment of *misdemeanors* instituted by *complaint* in the Justice of the Peace Court as well as a general savings clause saving the prosecution and punishment of *felonies* instituted by *indictment* or *information* as set out in said section, which reads as follows: "The termination or suspension (by whatever means effected) of any law creating a criminal offense does not constitute a bar to the *indictment* or *information* and punishment of an act already committed in violation of the law so ter-

minated or suspended, unless the intention to bar such indictment or information and punishment is expressly declared by an applicable provision of the law."

Petitioner contends that section 9608 of the Government Code of California does not save prosecution and punishment of crimes charged by *complaint* in a Justice of Peace Court, but operates solely, if it does, only as a general savings clause for those crimes specifically charged by *indictment* or *information,* specifically set out therein. Any other interpretation would violate Article 1, Sec. 9, par. 3, U. S. Constitution. (*Ong Chang Wing* v. *United States,* 218 U. S. 272 (31 S. Ct. 15, 15 L. Ed. 1040).) It is submitted that criminal statutes must be strictly construed, and where a statute specifically refers to what crimes and punishment are saved under a savings clause, only those contained therein are saved.

Jurisdictional Statement

(a) Jurisdiction to grant this petition is sustained under (A) 237 Judicial Code, U. S. A. (B), 28 U. S. C. A. 344.

(b) The constitutional provision of the United States denied by the Supreme Court of California is Art. 1, Section 9, par. 3, U. S. A.

(c) The judgment of the Supreme Court of California was rendered on April 27, 1945. Petition for rehearing was not filed due to lapse of statutory time. Petition for certiorari was filed July 24, 1945.

Questions Presented

The question presented is whether the Supreme Court of California denied petitioner his constitutional rights under Article 1, Section 9, para. 3 of the Constitution of the United States and whether the application made by it is inconsistent with the applicable decisions of the Su-

preme Court of the United States, in that the Supreme Court of California held that Section 9608 of the Government Code did not operate as an ex-post facto law insofar as petitioner is concerned, and therefore was no denial of his constitutional rights under Art. 1, Sec. 9, Par. 3 of the Constitution of the United States.

Reasons Relied On for Allowance of Writ

The Supreme Court of California has decided a question of substance and importance in a way not in accord with the applicable decisions of the Supreme Court of the United States. If inferences are to be drawn from statutes where the legislature has specifically set out what prosecutions shall be saved, then criminal statutes should be, and must be construed in that manner, and where there is a repeal of a criminal statute, with no savings clause, one cannot be inferred. Any enforcement of a judgment of this kind would be void, and a violation of petitioners' constitutional rights.

WHEREFORE, your petitioner prays that a writ of certiorari be issued by this Court to the Supreme Court of California, to the end that the judgment of said court may be reviewed by this Honorable Court.

ALAN W. DAVIDSON,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of Court Below

The opinion of the Court below was rendered on April 27, 1945. The opinion of the Supreme Court of California is not yet reported in the California Reports, but appears as 26 Cal. A. C. page 215.

Grounds on Which Jurisdiction of the Supreme Court of the United States Is Involved

The judgment of the Supreme Court of the State of California was rendered on April 27, 1945. Petition for rehearing was not filed due to lapse of statutory time. The judgment of the Supreme Court of California is based upon its application of Sect. 9608 of the Government Code. The jurisdiction of the Supreme Court of the United States is invoked under Article 1, Section 9, para. 3 of the Constitution of the United States, and the 5th and 14th amendments to the Constitution of the United States.

Statement of the Case

The facts on which the application was based are as follows:

(a) In the month of February, 1943, a complaint was filed in the respondent court charging petitioner and one Philip Webster with the crime of misdemeanor, to wit: violating section 182 of the Penal Code by conspiring together to violate section 153 of the Penal Code, alleged to have been committed on January 23, 1943.

(b) Petitioner entered his plea of not guilty to said charge and was tried, before a jury, in respondent court from March 25 to 27 inclusive, the jury on said last men-

tioned date returning a verdict finding petitioner guilty as charged.

(c) On March 30, 1943, the Hon. Paul Helmore, the Justice of the Peace presiding at said trial, pronounced and rendered judgment on said verdict, sentencing petitioner to imprisonment in the county jail of Marin County.

(d) That thereafter petitioner duly and regularly perfected his appeal from the said judgment to the Superior Court of the State of California, in and for the County of Marin. That said appeal was regularly pending before said superior court and the judge thereof affirmed the judgment. That the execution of said judgment was stayed pending said appeal.

(e) Following the affirmance of said judgment, petitioner procured from respondent court a stay of the execution of said judgment in order to make application for the writ herein prayed for. That petitioner has been and now is at liberty on bail since the rendition of said judgment.

(f) That at the time of the filing of said complaint, the rendition of said judgment and the taking and perfecting of petitioner's appeal from said judgment, the offense with which petitioner was charged was a MISDEMEANOR triable on complaint filed in a Justice's Court; that while said appeal was pending in said superior court the Legislature amended section 182 of the Penal Code by making it a FELONY to conspire to violate section 153 of the Penal Code. That by said amendment the Legislature repealed the law under which Petitioner was charged, tried and convicted, said repeal being without any saving clause as to offenses committed prior to said amendment and repeal.

(g) That from and after the said amendment and repeal of section 182 of the Penal Code, the respondent court has

been and is now without jurisdiction over the person of petitioner and has been and now is without jurisdiction, power or authority to carry into effect or execute, or make any orders carrying into effect or executing, the judgment so made and rendered as aforesaid. That despite the repeal of the said law and statute under which petitioner was convicted, said respondent court threatens and intends, and, unless prohibited by this Court from so doing, will cause said judgment against petitioner to be executed and carried into effect and will make all necessary orders and commitments for the purpose of carrying said judgment into effect and executing the same.

(h) The petitioner has no plain, speedy or adequate remedy in the ordinary course of the law; that no further appeal to any court lies from the judgment so pronounced against him; that unless the writ of certiorari issues, as prayed for, petitioner will suffer great and irreparable injury and will be deprived of his liberty without due process of law and imprisoned in the county jail to serve a sentence that has become void.

Specification of Errors

The Supreme Court of the State of California erred in holding that as a matter of law, the judgment and sentence as passed by respondent court was not void and unenforceable, and that Section 9608 of the Government Code of the State of California operating as a savings clause, saving the punishment and prosecutions for misdemeanors instituted by complaint, instead of those specifically set out in said section, to wit: indictment and information, specifically referring to felonies.

ARGUMENT

The opinion of the Supreme Court of California erred in holding that as a matter of law the judgment and sentence of the respondent court were enforceable, and not in violation of Article 1, Section 9, Para. 3 of the Constitution of the United States, and the 5th and 14th amendments thereto.

The question involved is as to the power of the Justice's Court to execute a judgment and sentence of imprisonment where the statute, under which petitioner was convicted, has been repealed pending an appeal from the judgment of conviction.

Petitioner contends that under such circumstances the trial court is without jurisdiction to enforce the judgment.

Effect of Repeal of Criminal Statute Pending Appeal

Where a criminal statute is repealed, without a saving clause, the proceedings against any defendant are terminated at the instant of such repeal. The effect of such repeal has been announced by our Supreme Court as follows:

> " 'If a penal statute is repealed pending an appeal, and before the final action of the appellate court, it will present an affirmance of a conviction, and the prosecution must be dismissed, or judgment reversed.' (Sutherland on Statutory Construction, sec. 166.) The proceeding is arrested at the very point where it is at the date of the repeal; if before indictment no indictment can be found; if after indictment, and before trial, no conviction can be had; if after conviction and before judgment, no judgment can be rendered. If the judgment is appealed from, and its enforcement is suspended until the determination of the appeal, the power to enforce the judgment falls with the repeal of the statute, and the appellate court will direct a dismissal of the proceedings. Until the determination of the appeal, the proceeding is pending in court, and the

judgment does not become final until affirmed by the appellate court. If, during the interim, the legislature repeals the statute under which the prosecution is had it operates as a discharge of the defendant. 'The repeal of the law imposing the penalty is of itself a remission.' "

Spears v. *County of Modoc,* 101 Cal. 303, 305.

To the same effect is the case of *People* v. *DeFerrari,* 63 Cal. App. 671, 673.

The Offense of Misdemeanor Conspiracy Was Repealed in 1943

Defendant was tried and convicted under section 182 of the Penal Code of a misdemeanor conspiracy. At the time of the alleged offense, trial and judgment, section 182 of the Penal Code provided various punishments for conspiring to commit various described acts. The offense involved herein was a conspiracy to violate section 153 of the Penal Code. Section 153 P. C. is a misdemeanor and a conspiracy to commit this crime was punishable in the same manner as for the commission of the crime itself.

In 1943 the Legislature amended section 182 of the Penal Code by making a conspiracy to commit any of the offenses denounced by that section a felony. Thus, at the present time, all criminal conspiracies are felonies to be prosecuted and punished by proceedings instituted in the Superior Court. Justices' Courts no longer have jurisdiction of any such offense.

It is fundamental that a statute which prescribes a different penalty for an offense operates as a repeal of the prior statute.

"A later statute prescribing a different punishment for an offense works a repeal of the former one by implication. (People v. Tisdale, 57 Cal. 104.)"

People v. *Lewis,* 4 Cal. App. (2d) Supp. 778.

section 182 P. C. changing the punish-
The amendment of he offense from a misdemeanor to a
ment and grade of t repeal of section 182 as it read at the
felony operated as a trial and conviction. Under the law
time of petitioner's court of any jurisdiction in the matter
this divests the lowe edings must be arrested.
and all further proc

Clause or Statute That Continued in
There Is No Saving ns of Section 182 P.C. as They Existed
Force the Provisi dment of 1943
Prior to the Ame

bove the repeal of a criminal statute
As pointed out a gs as of the moment of the repeal unless
arrests all proceedi ise which permits prosecutions of those
there is a saving cla ffenses prior to the repeal.
things which were c only saving clause will be found in
In California the olitical Code, which reads as follows:
Section 329 of the of any law creating a criminal offense

> "The repeal tute a bar to the indictment or infor-
> does not const nishment of an act already committed
> mation and pu the law so repealed, unless the inten-
> in violation of h indictment or information and pun-
> tion to bar su ressly declared in the repealing act."
> ishment is ex ection was repealed and re-enacted in

The foregoing 98 of the new Government Code, which
1943 as section 96 ows:
now reads as fol nation or suspension (by whatsoever

> "The term) of any law creating a criminal of-
> means effecte constitute a bar to the indictment or
> fense does no nd punishment of an act already com-
> information ation of the law so terminated or sus-
> mitted in vio s the intention to bar such indictment
> pended, unles n and punishment is expressly declared
> or informatio ble provision of law."
> by an applica

Government Code, with some slight
Section 9608, g, is identical with former Section 329
change of wordi

of the Political Code, and as this last section has been construed by our courts the same construction must apply to the section of the Government Code (23 Cal. Jur. p. 795, Sec. 173).

It will be noted that the foregoing general saving clauses do not save prosecutions that must be tried on a *complaint* filed in an inferior court. The word "complaint" is not contained in the sections. The words "indictment" and "information" refer to criminal actions commenced and triable only in the Superior Court.

A brief survey of the history of Sec. 329 Political Code and the decisions construing it will demonstrate the correctness of the foregoing statements.

The State Constitution of 1849, Art. I, Sec. 8, provided that "No person shall be held to answer for a capital or otherwise infamous crime, * * * unless on presentment or indictment of a grand jury."

On adoption of the Criminal Practice Act in 1850-51 it was provided as to what offenses had to be prosecuted by indictment and those that could be instituted by filing a complaint. Informations, as we now know them, were unknown. These sections of the Practice Act were as follows:

> "177. All public offenses prosecuted in the district court and the courts of sessions, must be prosecuted by indictments, * * *."
>
> "608. All proceedings and actions before a justice's, recorder's, or mayor's court, for a public offense, of which said courts have jurisdiction, shall be commenced by complaint setting forth the offense charged, * * *"

The foregoing sections of the Practice Act remained unchanged until the adoption of the codes in 1872, when the following sections of the Penal Code took their places:

> "888. All public offenses triable in the district and county courts, must be prosecuted by indictment, * * *."

> "1426. All proceedings and actions before a justice's or police court, for a public offense of which such courts have jurisdiction, must be commenced by complaint under oath, * * *."

So, from 1850 to 1872, the procedure had been definitely prescribed that proceedings in inferior courts had to be commenced by *complaint*, those in superior courts by *indictment*.

Therefore, when the legislature adopted the Political Code in 1872 it must be presumed that it did so with knowledge of the laws then in existence and the acts of previous legislatures (23 Cal. Jr. Sec. 159, p. 783). In 1872 the legislature enacted Sec. 329 of the Political Code, which then read:

> "The repeal of any law creating a criminal offense does not constitute a bar to the indictment and punishment of an act already committed in violation of the law so repealed, unless the intention to bar such indictment and punishment is expressly declared in the repealing act."

No mention is made therein of informations, as none existed at that time.

When the legislature thus created a saving statute it limited its application to those cases only that could be prosecuted by indictment; i. e., criminal offenses triable in the district and county courts (now superseded by our superior courts). It did not extend the operation of such statute to offenses triable in justice's or police courts and instituted by filing a complaint.

In 1879 our present Constitution was adopted, and Art. I, Sec. 8, reads as follows:

> "Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by

indictment, with or without such examination and commitment, as may be prescribed by law. A grand jury shall be drawn and summoned at least once each year in each county."

Here, for the first time, have we a procedure whereby one could be prosecuted by information.

In 1880 the case of *People* v. *Tisdale,* 57 Cal. 104, was decided by the Supreme Court. Tisdale had violated a statute in 1879, making the acts he did a felony. In April of 1880 the statute was amended, changing the punishment and reducing the crime from a felony to an indictable misdemeanor. In May, 1880, an information was filed charging Tisdale with committing the felony. The Supreme Court first held that the amendment constituted a repeal of the statute and then turned to the effect of 329 Political Code on the situation, holding that the word "information" could not be read into the section.

"The real and only question is, whether an information presented after the repeal of a law, which required that a person who violated it should be preceded against by indictment, can be sustained for an offense committed before the repeal. Were it not for Sec. 329 of the Political Code, we should answer this question, without hesitation, in the negative. That section read as follows: 'The repeal of any law creating a criminal offense does not constitute a bar to the indictment and punishment of an act already committed in violation of the law so repealed, unless the intention to bar such indictment and punishment is expressly declared in the repealing act.'

Assuming that by the 'indictment and punishment of an act' is meant the 'indictment and punishment of a person who has committed an act in violation of law,' we would be compelled, in order to uphold the information filed against respondents, to further assume that the Legislature also meant that the repeal of any law creating a criminal offense should not constitute a bar

> to a proceeding by information against a person who had violated such law before it was repealed. As the Political Code which contains the provision referred to went into effect several years before any one could be proceeded against by information for any offense, it will not be claimed that the Legislature which enacted it intended that a person who had violated a law might be proceeded against after its repeal by information." (P. 106.)

The *Tisdale* case is commented on in the case of *People* v. *McNulty*, 93 Cal. 427 at 440, as follows:

> "In People v. Tisdale, 57 Cal. 104, there is some discussion of section 329 of the Political Code; but at the time of the commission of the crime there charged, the defendant would have been proceeded against by indictment only, and not by information; and at the time of the decision, section 329 did not contain the word 'information.' But the defendants were prosecuted by information under a subsequent law; and the court held that section 329 could not be applied, because there was no power to inject into it the word 'information,' * * * ."

Immediately following the decision in the *Tisdale* case, holding that nothing could be injected into Sec. 329, Political Code, this section was amended in 1881 (Stats. 1881, p. 6) by adding the words "or information" after the word "indictment."

The foregoing cases and amendment of Sec. 329 show that judicial and legislative construction of this section is that the words "indictment" and "information" refer only to criminal accusations for offenses triable in the superior court and not to complaints for misdemeanors filed in the inferior courts. This contention is also held to be the law in the case of *United States* v. *Barr*, 4 Saw. 254.

The word "complaint" can no more be read into either Section 329, Political Code, or Section 9608, Government

Code, than the word "information" could have been read into either of them prior to 1881. As these sections are only a saving clause as to the repeal of statutes, the violation of which could only be prosecuted by "indictment or information," neither one is a saving clause for misdemeanors triable on a "complaint" filed in an inferior court such as a Justice's Court.

Conclusion

Petitioner prays that this Honorable Court grant this petition for a writ of certiorari.

Respectfully submitted,

ALAN W. DAVIDSON,
Attorney for Petitioner.

(9445)

SEP 24 1945
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1945

No. 256

A. A. SEKT,
Petitioner,

vs.

THE JUSTICE'S COURT OF SAN RAFAEL TOWNSHIP, COUNTY OF MARIN, STATE OF CALIFORNIA,
Respondent.

BRIEF FOR RESPONDENT.

ROBERT W. KENNY,
Attorney General of the State of California,
State Building, San Francisco, California,
Counsel for Respondent.

HAROLD JOS. HALEY,
District Attorney of Marin County,
Court House, San Rafael, California,
Of Counsel for Respondent.

Subject Index

	Page
Opinion of the Court Below	2
Grounds on Which Jurisdiction of the Supreme Court of the United States Is Invoked	2
Argument	2
Jurisdiction in the Supreme Court of the United States not established	3
The decision of the California Supreme Court is a complete answer to the present petition	6
Conclusion	7

Table of Authorities Cited

Cases

	Pages
Lynch et al. v. People of New York, 293 U. S. 52, 55 S. Ct. 16	3
Ong Chang Wing v. United States, 218 U. S. 272, 31 S. Ct. 15, 54 L. Ed. 1040	6

Codes

California Government Code, Section 9608	4, 6
California Penal Code, Section 182	6

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1945

No. 256

A. A. SEKT,
Petitioner,

vs.

THE JUSTICE'S COURT OF SAN RAFAEL TOWNSHIP, COUNTY OF MARIN, STATE OF CALIFORNIA,
Respondent.

BRIEF FOR RESPONDENT.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

In opposition to petitioner's application for a writ of certiorari to the Supreme Court of the State of California, the respondent respectfully submits the following:

OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of California, rendered on April 27, 1945, is not yet reported in the California Reports. However, it is reported in Advance California Reports, Volume 26, page 215; also in the Transcript of Record herein, pages 39 to 51, inclusive.

GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES IS INVOKED.

Petitioner invokes the jurisdiction of the Supreme Court of the United States under Article I, Section 9, paragraph 3 of the Constitution of the United States, and the 5th and 14th Amendments of the Constitution of the United States.

ARGUMENT.

It is respectfully submitted that the foundation essential to cause this Court to take jurisdiction of this cause is not made out by the petition. Furthermore, the argument and authorities presented by petitioner to this Court are, in the main, a repetition of those addressed to the Supreme Court of the State of California and are fully and correctly determined by the said decision of that Court.

JURISDICTION IN THE SUPREME COURT OF THE UNITED STATES NOT ESTABLISHED.

It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction.

Lynch et al. v. People of New York, 293 U. S. 52, 55 S. Ct. 16 at page 17, and authorities there cited.

Respondent submits that neither the present petition and supporting brief nor the petition for a writ of prohibition and the supporting brief before the Supreme Court of California (Transcript of Record, pages 1-10, incl.) affirmatively show either (1) that a federal question was presented for decision to the Supreme Court of California, the highest Court of the state having jurisdiction, or, (2) that its decision of the federal question was necessary to the determination of the cause. While the decision does hold that enforcement of the judgment of the respondent

Court does not transgress upon the *ex post facto* provision of the Constitution, there is no affirmative showing that the decision of the Supreme Court of California as rendered could not have been given without deciding that point.

It does, however, affirmatively appear that the decision of the Supreme Court of California rests on two grounds, but not squarely upon either, and that the ground independent of a federal question is sufficient in itself to sustain the decision. Section 9608 of the Government Code of California, formerly section 329 of the Political Code of California, appears in the decision at page 41 of the Transcript of Record and is a general saving clause contained in the body of the laws of the State of California. The decision holds (Transcript of Record, page 44) that the term "information" as used in a statute includes "complaint", and vice versa; that the authorities sustain a holding that included within the word "information" are all misdemeanor prosecutions; that it is not at all inconceivable that the California Legislature, when it amended Political Code section 329 in the year 1881, intended to save all criminal prosecutions whether commenced by "complaint" or otherwise, and used the word "information" in its generic rather than its technical sense; that a liberal construction of the statute would lead to this result, and that there is authority that the section should be liberally construed.

As another and completely independent ground from the foregoing the decision holds (Transcript of

Record, pages 44-51, incl.) that the offense committed by petitioner may be punished under the law as it existed when the offense was committed for the reason that the amendment of section 182 of the Penal Code made subsequent to petitioner's conviction and pending his appeal was not a repeal of the type to bring into operation the common-law rule that the repeal of a criminal statute, without an express saving clause, operates to terminate all pending prosecutions. The decision (Transcript of Record, pages 48-51, incl.) treats of the legal effect of an amendatory act increasing the punishment prescribed by a penal statute in its relation to prosecutions not reduced to final judgment when the amendatory act goes into effect. The decision holds that where the later statute increases the punishment the Legislature has clearly demonstrated its intent that the act should be punished, and since the offender cannot be punished under the new law because of the *ex post facto* provision of the Constitution he will be held under the old law; that it is presumed from the very purpose of the amendment that the Legislature intended that all offenders should be punished, and a saving clause is implied; that the authorities upon this proposition reason that there is no constitutional prohibition against making the old statute applicable to offenses committed before its amendment; that whether the old law has been repealed or is saved for past offenders depends upon legislative intent; that by increasing the punishment the Legislature has clearly indicated that it intended that particular offense to be punished; that

to hold that the amendment operates to remit offenses not reduced to final judgment is technical and clearly violative of the legislative intent. (Citing *Ong Chang Wing v. United States,* 218 U. S. 272 (31 S. Ct. 15, 54 L. Ed. 1040), and other authorities.)

It is submitted, therefore, that this Court will not take jurisdiction of the cause.

THE DECISION OF THE CALIFORNIA SUPREME COURT IS A COMPLETE ANSWER TO THE PRESENT PETITION.

The question involved on the merits, more accurately stated, is: Is the power of the respondent Court to execute its judgment of imprisonment upon the petitioner saved by said section 9608 of the Government Code, the general saving clause, or by properly implying a saving clause in the 1943 amendment of section 182 of the California Penal Code, the statute under which petitioner was convicted, the amendment occurring after conviction and pending appeal, the legal effect of the amendatory act being to provide increased punishment for violating the said section of the Penal Code?

This question is carefully and fully considered by the decision of the California Supreme Court, unanimously given by all of the members of that Court, and is a full and complete answer to the present petition, its argument and authorities.

CONCLUSION.

Respondent prays that this Honorable Court deny the petition for a writ of certiorari.

Dated, San Rafael, California,
September 17, 1945.

Respectfully submitted,

ROBERT W. KENNY,
Attorney General of the State of California,
Counsel for Respondent.

HAROLD JOS. HALEY,
District Attorney of Marin County,
Of Counsel for Respondent.

Due service and receipt of a copy of the within is hereby admitted

this.....day of September, 1945.

_____

Counsel for Petitioner.